

**The A.S. Abell Company and Baltimore Typographical Union No. 12**

**The Baltimore News American Division, The Hearst Corporation and Baltimore Typographical Union No. 12.** Cases 5-CA-7980 and 5-CA-8061

August 26, 1981

# **SUPPLEMENTAL DECISION AND ORDER**

**BY MEMBERS FANNING, JENKINS, AND  
ZIMMERMAN**

On May 6, 1981, Administrative Law Judge Sidney J. Barban issued the attached Supplemental Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and Respondent The Baltimore News American Division, The Hearst Corporation (herein Respondent Hearst) filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge, as modified herein, and to adopt his recommended Order, as modified below.

At issue before the Board is the question of the entitlement of employees Martin, Randolph, Everhart, Woodruff, Burrows, and Oberg to vacation benefits from Respondent Hearst. There are no exceptions to the Administrative Law Judge's disposition of the backpay liability of Respondent A. S. Abell Company, or to his disposition of the backpay liability of Respondent Hearst except with respect to the vacation benefits due the employees named above, and we adopt those findings and conclusions to which no exceptions have been filed. We disagree, however, with the Administrative Law Judge's treatment of the vacation benefits issue.

As the Administrative Law Judge found, each of the six named employees was unlawfully terminated at a time when he had been employed by Respondent Hearst for more than 4 years, and that this length of service presumptively entitled him to vacation benefits pursuant to the applicable collective-bargaining agreement. However, the Administrative Law Judge found that it was impossible to calculate the amount of vacation benefits to which each employee was entitled without evidence of his prior absentee rate, and concluded that the presentation of such evidence was part of the burden of

the General Counsel. In the circumstances of this case we believe this conclusion to be in error.

The agreement states that employees with 4 years of service are entitled to 20 days' vacation pay, unless they were "fully paid for less than 215 straight time shifts," in which case they "shall receive vacation credits based on one day for each 12 days worked . . . ."<sup>1</sup> The question is whether the General Counsel's undisputed showing that these employees each had 4 years of appropriate service is sufficient to make them presumptively entitled to 20 days' vacation pay, and to shift the burden to Respondent Hearst to show otherwise. The evidence which might warrant a reduction of that entitlement is in the payroll records in Respondent Hearst's possession. It is reasonable, therefore, to place on Respondent Hearst the responsibility for showing that they were entitled to less or none. This shift of burden accords with our normal practice with regard to diminution of backpay. See *Eastgate I.G.A. Foodliner*, 253 NLRB 735 (1980).

Here, of course, Respondent Hearst did not come forward with the evidence we have found it was its burden to produce. However, we deem it appropriate to allow it a further opportunity to do so. We do not perceive Respondent Hearst's withholding of this evidence as an attempt to prolong these proceedings. Rather, it appears that it believed in good faith that presentation of this evidence was part of the General Counsel's burden, as the Administrative Law Judge found. The General Counsel, for his part, however, acknowledges in his brief in support of exception that evidence of these employees' absentee rates, if such exists, could reduce their entitlements, and states that the General Counsel "will accept a reduced vacation benefit award if the applicable absentee rates can be agreed upon." To best accommodate the parties' legitimate desire to resolve this matter fairly and finally, we shall remand the issue of vacation benefits for these employees to the Administrative Law Judge.<sup>2</sup>

<sup>1</sup> The pertinent section of the collective-bargaining agreement reads as follows:

Employees with four (4) or more years continuous priority in any particular office shall commence earning vacation credits on the basis of four (4) weeks vacation with 20 days' pay for the succeeding vacation credit year, said earning of vacation credits for each individual employee to begin on the day the employee reaches his fourth anniversary of continuous priority in any one office. Employees with four (4) or more years of continuous priority in any one office who have been fully paid for less than 214 straight time shifts, such as holidays and vacations, prior to March 1, shall receive vacation credits based on one day for each 12 days worked on a situation.

<sup>2</sup> If the parties are able to reach agreement which the Administrative Law Judge approves, of course, further proceedings will be unnecessary.

## ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondents, The A. S. Abell Company and The Baltimore News American Division, The Hearst Corporation, Baltimore, Maryland, their officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order as so modified:

Delete paragraph 4.

IT IS FURTHER ORDERED that Case 5-CA-8061 be, and it hereby is, severed and remanded to the Administrative Law Judge for determination of the issue of vacation credits to employees Martin, Randolph, Everhart, Woodruff, Burrows, and Oberg consistent with the foregoing Decision.

## SUPPLEMENTAL DECISION

## STATEMENT OF THE CASE

SIDNEY J. BARBAN, Administrative Law Judge: This matter was heard at Baltimore, Maryland, on March 10, 11, 12, 13, 19, 20, and 25, 1980, upon separate backpay specifications issued in Case 5-CA-7890, in respect to Respondent The A. S. Abell Company (herein Respondent Abell or Abell), on October 10, 1979, and in Case 5-CA-8061, in respect to Respondent The Baltimore News American Division, The Hearst Corporation (herein Respondent Hearst or Hearst), on October 12, 1979, pursuant to a Decision and Order of the National Labor Relations Board (herein the Board), issued on June 8, 1977 (230 NLRB 17), and a Supplemental Decision and Order issued on June 28, 1979 (243 NLRB 171), in Case 5-CA-7980, and pursuant to a Decision and Order of the Board issued on June 14, 1977 (230 NLRB 216), and a Supplemental Decision and Order issued on June 28, 1979, in Case 5-CA-8061 (243 NLRB 170). Answers were duly filed by Respondents controverting the allegations of the backpay specifications, and raising certain issues which will be considered hereinafter.

In accordance with discussions had at the hearing, in an effort to settle some of the problems with which the parties were having difficulty, I issued, on May 28, 1980, a preliminary Decision and Order in this matter, which is incorporated herein by reference. Respondent Abell and the General Counsel requested special permission to appeal from that Decision and Order, which was denied by the Board on August 12, 1980, on the ground that the matters complained of could "be dealt with adequately upon exceptions of the Administrative Law Judge's Supplemental Decision."

Upon the entire record in this case, from observation of the witnesses and their demeanor, and after consideration of the briefs filed by Respondents Abell and Hearst, and by the General Counsel, I make the following:

FINDINGS AND CONCLUSIONS<sup>1</sup>

## I. THE PRIOR PROCEEDINGS

The Decisions and Orders of the Board in the prior cases, and the opinion of the court of appeals were described at some length in the preliminary Decision, and will not be repeated here. Suffice it to say that the Board held that each of the Respondents had violated the Act, in the circumstances here obtaining, by inducing certain of their employees through payment of large sums of money (referred to as the "buyout") to take early retirement from their employment, and ordered (a) that these employees be offered reinstatement, but imposed as a condition to reinstatement that such employees repay to the Respondent involved the excess, if any, of the employee's buyout over the amount of his net backpay, and (b) that such employees be made whole for losses suffered as a result of Respondent's unfair labor practices, with the proviso that interim earnings for any such employee who "desires to return to work pursuant to this Order shall include any payments received pursuant to the [buyout]."

In the preliminary Decision, in essence, I held that (1) employees who refused, or were not eligible for reinstatement are not entitled to backpay, (2) Respondents are obligated to pay interest on backpay awards, computed in accordance with *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962), (3) backpay should be computed on a quarterly basis, and that (4) the employees induced to retire had an obligation to seek interim employment (this conclusion arrived at quite reluctantly), and also discussed the factors and formulas to be used in determining deductions from gross backpay for absenteeism and in determining Respondents' obligation for pension fund contributions and the employees' rights to vacation payments. Each of these will be further considered in connection with specific cases hereinafter.

## II. ISSUES INVOLVING RESPONDENT HEARST

A. *Eight Uncontested Employees*

Thirteen of Hearst's employees were involved in the buyout. As to two of these, Earl Cummins and Curtis Johnson-Bey, the General Counsel agrees that no backpay is due. Nor does it appear that any other benefits are claimed for these two. As to six employees, Robert Burrows, Dennis Everhart, John H. Martin, Jr., Carl Oberg, Arthur G. Randolph, and William L. Woodruff, the General Counsel and Respondent Hearst are in agreement as to the amount of backpay due and the amount of ITU Pension contributions owed on behalf of these employees. Respondent Hearst attached to its brief a receipt showing that it had paid over to the Board, on March 21, 1980, the agreed-upon amounts. However, these payments do not include interest. Respondent Hearst therefore owes interest on these amounts to March 21, 1980, in accordance with the preliminary Decision in this matter. At the time the parties agreed upon the backpay

<sup>1</sup> Reference herein to "briefs" of the parties refers to the final briefs or memorandums submitted in early October 1980.

and pension benefits owed on behalf of these employees, the parties reserved the issue of what vacation benefits, if any, are due these six employees. This issue will be considered hereinafter.

### B. Ann Righter

Righter, who accepted a buyout of \$20,000, payable in monthly installments, from Hearst, refused Respondent's offer of reinstatement because she preferred other employment which she had secured. In the preliminary Decision, I held that under the Board's Order employees who had accepted buyout payments from Respondents to take early retirement and thereafter refused an offer of reinstatement were not eligible to receive backpay or lost fringe benefits (but were likewise under no obligation under the Board's Order to repay the buyout). The General Counsel requests that I reconsider my decision that those employees are not entitled to backpay. As I pointed out in the preliminary Decision, the language of the Board's remedy and Order in this case convinces me that the Board did not order backpay paid to those employees who elected not to return to work.<sup>2</sup>

I have had some second thoughts which I will discuss hereinafter, concerning situations in which employees show a desire or intention to return to work, but are prevented by some action or conduct of a respondent, but that is not the case here.

For the reasons stated I find that Righter is not entitled to backpay or lost benefits by reason of Respondent's unfair labor practices against her.

### C. Francisco Cardozo and Lee Martinez

None of the parties has been able to locate either Cardozo or Martinez during the entire course of this proceeding despite reasonable efforts to do so by the General Counsel, Respondent Hearst, and the Union. According to the stipulation of the parties, Cardozo last worked for Hearst February 27, 1976,<sup>3</sup> Martinez, on August 14, 1976.

On March 9, 1979, Hearst sent Cardozo a letter offering him reinstatement to work. The letter was returned, marked "Addressee Unknown, no forwarding address." On October 13, 1977, Hearst sent Martinez a letter offering reinstatement. It received no response to this letter.

No gross pay figures were alleged in the backpay specification for either Cardozo or Martinez, it being noted that the General Counsel had been unable to locate these persons. But sufficient data was developed at the hearing to compute gross backpay figures for each. The General Counsel argues that Hearst should be ordered to pay those gross amounts to the Regional Director for Region 5 to be held in escrow for a reasonable

time while further efforts are made to locate Cardozo and Martinez. See, e.g., *Semiole Asphalt Refining, Inc.*, 225 NLRB 1202 (1976). Hearst responds that this "would serve no practical purpose . . . because nothing further can be done to locate the employees," and "it would be unfair to deprive Respondent of the use of these funds for several years in the vague hope" that someone may yet find these employees.

So far as I am aware, the Board has never specifically passed on this issue of what length of time or what circumstances justify a holding that a respondent has no further obligation to a missing discriminatee. However, I have noted that in *Semiole Asphalt, supra*, the Board, some 4 years after the unfair labor practice, ordered gross backpay for a missing discriminatee (Dunn) held in escrow for 1 year while a final effort was made to locate the employee.

In the present matter I am impressed not only with the time that has passed, but even more by the fact that none of the parties has been able to locate these employees from the beginning and that the General Counsel failed to allege gross backpay due these men in the specification. Thus, this is not a case in which these employees are known at some time to have exhibited an interest in this matter or cooperated in its prosecution, but could not be located for the backpay hearing. In these circumstances, I believe that, rather than ordering that Respondent Hearst pay the gross backpay due these men into an escrow account for a year, it would be more appropriate to retain jurisdiction over this matter for 1 year from the date of the order herein with respect to these two men, with permission to the General Counsel, if he can locate one or both of them in that time, to move to reopen this matter with regard to Cardozo or Martinez, or both of them.

### D. Allan Czarnowsky

#### 1. Backpay

##### (a) Absenteeism

The parties are in disagreement as to what rate of absenteeism should be applied in calculating the gross backpay owed to Czarnowsky. Figures were supplied for work periods from the beginning of 1974 through the end of 1979. Czarnowsky had a heart attack in December 1975 (he had no prior history of heart attacks) which caused him to miss the first 6 consecutive months of 1974. Czarnowsky was at work 42 percent of the entire year of 1974, indicating a loss of 8 percent of worktime for the last 6 months, after he returned to work that year. In 1975, Czarnowsky was present at work 92 percent of the time, again showing 8 percent lost time. In the latter part of 1975, Czarnowsky had an operation which caused him to lose another 6 consecutive months from work. As a result, Czarnowsky was at work only 4 percent of the time from the first of January through July 1976 (the time of the buyout). After the buyout, during the backpay period, Czarnowsky, in describing the condition of his health, stated, "I wouldn't say 100 percent, but I was not sick at any time." Just before returning to work for Respondent Hearst, Czarnowsky

<sup>2</sup> In addition to the references in the preliminary Decision, I have noted that par. 2(b) of the Board's Order contains this language: "Interim earnings for an employee who was unlawfully induced to retire early but desires to return to work pursuant to this Order shall include any payments received pursuant to [the buyout]." (Emphasis supplied.) If the Board had intended that all of the discriminatees receive backpay, the language emphasized would clearly be surplusage.

<sup>3</sup> In a footnote to Appendix 6 of his brief, the General Counsel suggests this date is erroneous since the buyout was not implemented until July 1, 1976. It is unnecessary to pass on this.

was diagnosed as having high blood pressure. After his return to work in March 1979 until the end of December 1979, Czarnowsky was present at work 79 percent of the time. He attributed his absence from work during this period to his high blood pressure, adding that he had trouble breathing in humid weather. Czarnowsky also acknowledged that his legs hurt in "bad weather."

The General Counsel asserts that Czarnowsky's rate of absenteeism should be determined by reference to the year 1975, the only year in which he had no debilitating illness, and his absence rate was 8 percent. Hearst argues that a reasonable procedure would be to average all of the years from 1974 through 1979 or use Czarnowsky's attendance record after he returned in 1979. I find none of these contentions very satisfactory. Respondent's main argument (averaging 1974 through 1979) penalizes Czarnowsky heavily for unusual absences for illness and operations. The General Counsel's proposal does not take into account any cumulative effect of Czarnowsky's various illnesses upon his work patterns. A more realistic procedure would be to disregard the 6 consecutive months in 1974, when Czarnowsky was out of work recovering from his heart attack and also disregard the 6 consecutive months in 1976 when he was out of work recovering from an operation on his legs. On this basis, Czarnowsky had an absence rate of 8 percent in 1974, or an attendance rate of 92 percent; he had the same in 1975. In 1976, Czarnowsky was out until approximately July recovering from his operation. In July he was illegally terminated. I would ignore the 4 percent annual attendance figure for 1976, based on the short period he was at work between these two events. I will thus average an attendance rate of 92 percent in 1974, 92 percent in 1975, and 78 percent in 1979. This gives an average attendance rate of something in excess of 87 percent, which (87 percent) I believe is a reasonable rate to use for these purposes.

#### (b) *Interim employment*

After being "retired" on or about July 9, 1976, Czarnowsky did not seek work during the month of July. In August he began contacting firms in the printing industry which might have need for the printing skills which he possessed. He also periodically contacted the business manager of the Baltimore Typographical Union to ascertain what situations were available, and read newspaper want ads looking for work requiring his skills. He appears to have followed this pattern of action during the entire backpay period, whenever he was not employed.

Czarnowsky had been employed in the printing industry since he was 16 years of age. For most of his adult working life, the only work he knew was that of a linotype operator. However, for some period before going to work for Hearst, he had worked behind a bar dispensing beer in two taverns (he referred to this as "Beertending"). He was not qualified to serve a wide range of mixed drinks, however, as a bartender.

In the third quarter of 1976, Czarnowsky obtained employment at a tavern dispensing beer behind the bar. After a couple of months he was laid off when the owners no longer had need for him. Czarnowsky testified that he did not thereafter check help wanted ads in

the paper or look for taverns seeking help to dispense beer across a bar, because he was concerned that as a bartender he might become involved in the physical affairs that often occur in those situations, and because "there were not many taverns that are strictly beer taverns that are looking for help." There was no evidence that during the backpay period there were newspaper ads, or that there were jobs available in taverns for which Czarnowsky was qualified.

Czarnowsky obtained employment with Baltimore Type and Composition Company in the fourth quarter of 1977 and continued with them until that company went out of business, apparently in the second quarter of 1978. He next secured employment as a maintenance man at an apartment house in the first quarter of 1979, apparently until the time he was reinstated by Respondent Hearst in March 1979.

Respondent Hearst contends that Czarnowsky should be penalized for 3 weeks in July 1976, immediately after he "retired," when he admittedly did not seek work. Respondent also argues that Czarnowsky's failure to look for bartending jobs in the second, third, and fourth quarters of 1977, until December 5 (when he was employed by Baltimore Type), "constitutes a willful loss of earnings" for which he should be penalized for 45 weeks. I do not agree.

As the Board held in *Saginaw Aggregates, Inc.*, 198 NLRB 598 (1972) (where the discriminatee seems not to have sought work for 2 weeks after his layoff): "It is now well settled that an employee discriminatorily [terminated] need not instantly seek new work; rather the test is whether, on the record as a whole, the employee has diligently sought employment during the entire backpay period."

On the record as a whole, it cannot be said that Czarnowsky did not make reasonable and diligent efforts to find interim employment. Though Respondent asserts that after a reasonable time Czarnowsky should have "lowered his sights" and sought other employment, such as bartending,<sup>4</sup> the record does show that Czarnowsky was willing to accept other employment besides typesetting, when such work was available. As to his reluctance to work at bartending jobs, I do not believe that, in circumstances such as these, an employee should be required to seek employment which he rationally believes may subject him to physical hazard. In any event, there is no indication that any such employment was available during the period involved. I therefore do not find that Czarnowsky should be penalized as Respondent argues.

#### (c) *Backpay computation*

The parties are agreed as to the maximum number of work shifts and the wage rate per shift applicable to each quarter in the backpay period. There is no dispute as to the amount of Czarnowsky's interim earnings in each

<sup>4</sup> Respondent Hearst argues, "Since Czarnowsky had experience as a bartender and in view of the acknowledged scarcity of printing jobs, Czarnowsky's refusal to seek non-printing employment during the second and third quarters of 1977 and the fourth quarter of 1977 until December 5, 1977, constitutes a willful loss of earnings disqualifying him for backpay . . . [for 45 weeks]."

quarter. I have computed the backpay due Czarnowsky by quarters, as detailed below, by (1) multiplying the applicable number of shifts by the applicable shift rate; (2) multiplying the result thereof by Czarnowsky's attendance rate (87 percent) to find the gross backpay figures;<sup>5</sup> and deducting from this quarterly gross backpay figure the amount of any interim earnings in that quarter plus a portion of the buyout payment which together with the amount of the interim earnings will equal to the gross backpay figure, until the total amount of the buyout is exhausted.

The General Counsel's suggested method of handling the quarterly deduction of the buyout is somewhat different. He would deduct in each quarter, until the buyout is exhausted, an amount of the buyout equal to the gross backpay figure. One result of this computation is that

where the employee had interim earnings in the quarter, those earnings plus the buyout figure allocated to that quarter will exceed gross backpay, until the quarter in which the total buyout is exhausted. The General Counsel states that in such instances, those quarterly excesses should be used to diminish or wipe out net backpay due in other quarters in which gross backpay exceeded interim earnings. This method of computation, however (though it should give the same ultimate result as the method I have chosen), seems to me to violate the principles of *F. W. Woolworth Company*, 90 NLRB 289 (1950), to the effect that in computing the backpay each quarter should stand on its own.

Based on the above analyses, Czarnowsky's backpay has been computed as follows:

	Qtr.	Shifts	Rate	Total	Attendance	Interim Earnings	Buyout	Net Backpay
3Q76	59	\$58.10	\$3427.90	.87	\$2982.27	272	\$2710.27	\$0
4Q76	65	58.10	3776.50	.87	3285.56	125	3160.56	0
1Q77	65	60.30	3919.50	.87	3409.97	0	3409.97	0
2Q77	65	60.30	3919.50	.87	3409.97	0	3409.97	0
3Q77	65	62.10	4036.50	.87	3511.76	0	2309.93	1202.53
4Q77	65	62.10	4036.50	.87	3511.76	280	3231.76	
1Q78	65	64.30	4179.50	.87	3636.17	910	2726.17	
2Q78	65	64.30	4179.50	.87	3636.17	910	2726.17	
3Q78	65	66.10	4296.50	.87	3737.96	0	3737.96	
4Q78	65	66.10	4296.50	.87	3737.96	0	3737.96	
1Q79	53	70.16	3715.30	.87	3232.31	1320	1912.31	
Total Net Backpay								\$18,274.86

#### E. Frederick Cucco

##### 1. Interim employment; health problems

Cucco's last day of work for Hearst prior to being "retired" was August 8, 1976. He immediately sought assistance through the Maryland Unemployment Compensation office. When this was unsuccessful, Cucco, called printing establishments in Baltimore. In 1976 and 1977, Cucco sought work at an automobile dealer, a paint store, the railroad, a liquor distributor and in the refrigeration industry. Cucco applied for work through the CETA program<sup>6</sup> and another job assistance program that he referred to as the Manpower Wagon. At various times during the backpay period, he responded to newspaper ads. In October and December 1977, he unsuccessfully sought work in Pennsylvania.

Cucco's backpay picture is complicated by a pattern of illness during this period resulting from complications caused by diabetes. Cucco had suffered from diabetes

since childhood. It seems not to have interfered much with his work for Respondent Hearst; his absentee rate before the buyout was 20 percent, and after his reinstatement, 10 percent. However, between December 1976 and about mid-February 1977, though continuing to seek work by responding to newspaper ads by telephone, Cucco was not feeling well. In late September 1977, at the invitation of a friend, Cucco drove to Florida to seek work. He immediately became seriously ill, near comatose with a high sugar level in his blood stream. He flew back to Baltimore. The entire trip to Florida consumed 4 days. For about 3 weeks thereafter Cucco was in Baltimore recuperating from his illness. In October 1977, at the invitation of another friend, with whom he had previously worked, Cucco traveled to Pennsylvania to look for work. Though he and his friend sought work for Cucco, they were unsuccessful. During this period Cucco continued to feel unwell. Toward the end of the year, or the beginning of 1978, Cucco returned to Balti-

<sup>5</sup> It is noted that Respondent Hearst uses a slightly different computation to find the gross backpay figure, multiplying the applicable number of shifts by the attendance factor, and then after rounding off the resultant fractional figure, multiplying that figure by the shift rate. Overall, I consider that the method chosen above will give more accurate results.

<sup>6</sup> Respondent argues that "[f]rom June 1977 until the end of July 1977, Cucco was too ill to qualify for the CETA program." This misconstrues the record. Cucco sought work through that program and was hired by a private company. When, in the course of medical examinations, it was found that he had a high blood sugar level, he was told that he could not be employed until he got the sugar level down. Cucco then sought other work.

more. On January 13, 1978, he had a bad automobile accident and was confined to bed for about a month and a half (apparently to the first part of March 1978).

About the first of June 1978, after medical examinations, Cucco was informed that as a result of his diabetic condition he was medically disabled from work. He was not released for work until October 1978. He obtained employment in October with a firm in the printing industry, but was laid off after 2 weeks through no fault of his own. He continued to seek work and was employed by Automatic Data Process on November 7, 1978. In anticipation of reinstatement with Hearst, Cucco quit this employment on January 25, 1979 (somewhat prematurely as it turned out).

## 2. Backpay computation

The General Counsel and Respondent Hearst differ significantly as to the computation of backpay due to Cucco, based in part on differing interpretations as to when Cucco was ill and thus unavailable for work, and with respect to the application of disability payments to Cucco under provisions of the applicable collective-bargaining agreements (sec. 60 of the 1974-76 contract; sec. 66 of the 1977-79 contract).<sup>7</sup>

The positions of the parties are discussed immediately following on a quarterly basis:

*Third Quarter 1976*—the parties are agreed that by reason of the allocation of \$1,843.92 of the buyout to this quarter, there is no net backpay due Cucco for this quarter.

*Fourth Quarter 1976*—In this quarter Respondent Hearst contends (Exh. F attached to the brief) that Cucco was disabled from work for 20 shifts—4 weeks—but would allow disability pay. Hearst does not explain the basis for penalizing Cucco 20 shifts in this quarter. The General Counsel contends that Cucco should not be penalized during this quarter because the record shows that he was actively seeking work during this quarter and he does not appear to have declined employment. It further does not appear that he was under the care of a doctor at this time. It is the Respondent's burden to

show that Cucco was removed from the job market during this period. Though Cucco admits not feeling well in December, he insists that if he could have found the work he was seeking, he could have worked. For these reasons, and because the selection of any specific penalty would be based entirely upon speculation, I find that Cucco should not be penalized during this quarter. By reason of the allocation of \$3,073.20 of the buyout to this quarter, however, the General Counsel claims no net backpay for this quarter. Respondent Hearst by allocating a lesser amount, arrives at the same result.

*First Quarter 1977*—Hearst contends (Exh. F) that Cucco should be penalized 50 shifts for disability during this quarter, but apparently would award disability pay based on 40 shifts. Respondent again does not explain the basis for its claim. Here again Cucco admits that the indisposition he felt in December continued until mid-February, but that he was seeking work. For the same reasons set forth with respect to the fourth quarter in 1976, I find that Cucco should not be penalized during this quarter. By reason of the allocation of \$3,187.60 of the buyout to this quarter, the General Counsel claims no net backpay for the quarter. Respondent by allocation of a lesser amount arrives at the same result.

*Second Quarter 1977*—Hearst claims no disability penalty for this quarter. Both parties claim no net backpay due this quarter. The General Counsel allots \$3,187.60 of the buyout to the quarter, Respondent, a lesser amount.

*Third Quarter 1977*—Hearst contends that Cucco was disabled for this entire quarter and should be awarded only disability pay. The General Counsel asserts that Cucco should not be charged with any disability for this quarter. The facts show that in late September, Cucco became very ill on a trip to Florida which eventually lasted 4 days, and could not work. For 3 weeks thereafter, undoubtedly in October, he was disabled, recuperating from that onset of illness. The General Counsel without explanation, places this entire disability in the fourth quarter of 1977. Respondent, on the other hand, does not explain its claim that Cucco was disabled during this entire third quarter.<sup>8</sup> On this basis Cucco's backpay for the quarter is computed as set forth below:

Shifts	Rate	Total	Attendance	Gross Backpay	Interim Earnings	Buyout	Net Backpay
61*	63.10	\$3849.10	**80	***\$3079.28	0	\$3079.28	0

\*65 shifts less 4 for the trip to Florida.

\*\*This is the agreed attendance figure. In this situation it probably distorts the result somewhat since it probably reflects absence for illness and we have already adjusted the number of shifts for illness.

\*\*\*Disability pay not applicable here since it becomes effective only on the 8th day of illness.

*Fourth Quarter 1977*—Both Respondent and the General Counsel agree that Cucco should be penalized five

shifts for disability in this quarter. However, based on the analysis set forth above, I find that Cucco was dis-

<sup>7</sup> In brief, those contracts provide that a full-time regular employee, actively employed, with at least 6 months' service who is under the care of a doctor for a period of disability, shall receive benefits of 55 percent of his basic weekly straight time wage up to a maximum of \$125 per week

(\$150 per week after July 6, 1978) beginning on the 8th day of disability, for a total of 26 weeks (with certain qualifications).

<sup>8</sup> The fact that during this quarter he was rejected by an employer who had a higher medical standard than he could meet in and of itself does not disqualify Cucco, as Respondent seems to claim. (See fn. 6, above.)

abled for 3 weeks (15 shifts) in October while recuperat-

ing from the illness incurred in Florida. On this basis, backpay for this quarter would be as follows:

<i>Shifts</i>	<i>Rate</i>	<i>Total</i>	<i>Attend- ance</i>	<i>Gross Back- pay</i>	<i>Dis- ability Pay</i>	<i>Total Gross</i>	<i>Buyout</i>	<i>Net Backpay</i>
50*	63.10	\$3155	** .80	\$2,2524	\$300	\$2824	\$628.84	\$2,195.16

\*65 shifts less 15

\*\*As noted above this probably distorts the result somewhat.

*First Quarter 1978*—Both the General Counsel and Respondent agree that Cucco should be penalized 35 shifts in this quarter, as computed by the Region's compliance

officer. I accept the agreement. On this basis, backpay for this quarter is computed as follows:

<i>Shifts</i>	<i>Rate</i>	<i>Total</i>	<i>Attendance</i>	<i>Gross Backpay</i>	<i>Interim Earnings</i>	<i>Net Backpay</i>
30	65.30	\$1959	.80	\$1,567.20	0	\$1,567.20

*Second Quarter 1978*—The General Counsel and Respondent Hearst agree that Cucco is entitled to \$875 net backpay for this quarter, from disability payments.

*Third Quarter 1978*—The General Counsel and Respondent Hearst agree that Cucco is entitled to \$1,850 net backpay for this quarter, from disability payments.

*Fourth Quarter 1978*—The General Counsel and Respondent Hearst agreed that Cucco is entitled to \$2,115.58 net backpay for this quarter.

*First Quarter 1979*—The General Counsel and Respondent agreed that Cucco is entitled to \$414.26 net backpay for this quarter.

*Summary and total.* Based upon the above, no net quarterly backpay is due for the third quarter 1976 through the third quarter 1977. Net quarterly backpay for the remaining quarters are as follows:

4thQ77	\$2,195.16
1stQ78	1,567.20
2ndQ78	875.00
3rdQ78	1,850.00
4thQ78	2,115.58
1stQ79	414.26
Total Net Backpay	\$9,017.20

### 3. Medical expenses

The backpay specification in this matter alleges medical expenses of \$1,222.45 due Cucco, apparently incurred in the fourth quarter of 1977. This is not denied. I find that Cucco is entitled to \$1,222.45 in medical expenses.

### F. Vacation Benefits

The General Counsel contends that Respondent is obligated to Cucco and Czarnowsky and its other employ-

ees involved in this matter for certain vacation benefits, stated in the backpay specification to be "4 (four) weeks' vacation with 20 (twenty) days' pay for the year 1979 . . . which represents the vacation credit each employee would have earned during the backpay period." (Par. B2) However, the General Counsel contends here that Czarnowsky is entitled to 17 and a fraction vacation days at most, and that Cucco at most is entitled to 7-3/4 vacation days.

According to section 56 of the applicable bargaining agreement, as explained by the parties (see the preliminary Decision), employees with 4 or more years of service, such as Czarnowsky and Cucco, who are paid for at least 215 "fully paid shifts,"<sup>9</sup> from March 1 through the last day of the following February (the vacation credit year) are entitled to 4 weeks' vacation credit with 20 days' pay. Employees who have earned less than 215 fully paid shifts during the vacation credit year are entitled to 1 day's vacation for each 12 fully paid shifts. The vacation entitlement is taken in the 12-month period following the vacation credit year.

The backpay specification thus claims that Czarnowsky and Cucco, and the other employees involved, were entitled to vacation benefits which were earned from March 1, 1978, through February 28, 1979, to be used in the following 12 months, but which they did not receive.

It is therefore first necessary to determine how many fully paid shifts should be credited to each of these employees during the period from March 1, 1978, through

<sup>9</sup> The parties seemingly agreed that the bargaining agreements require the employees to work "fully paid shifts" to qualify for vacations and pension contributions. In the preliminary Decision, it was held that the number of "fully paid shifts" in the backpay period are the number of shifts available to be worked reduced by the individual's absentee factor.

February 28, 1979. The parties are agreed that there are 260 total available shifts in the work year. As held in the preliminary Decision, this figure should be reduced by the employee's absentee factor. In Czarnowsky's case this gives 226 fully paid shifts. He is, therefore, entitled to vacation credits based on 4 weeks of vacation with 20 days of pay.

In Cucco's case, the problem is again complicated by his disabilities during the backpay period. Those shifts when he was ill during the vacation credit year must be deducted from the shifts available. The analysis is as follows: In March 1978, Cucco had available 22 shifts. His attendance figure for the quarter was 80 percent. He is therefore credited with 17.6 shifts for March 1978. The General Counsel and Respondent seemingly agreed that Cucco is not entitled to any credit for shifts in the second and third quarters of 1978. His attendance figure for this quarter is 90 percent. He is therefore credited with 58.5 shifts for this quarter. Both Respondent and the General Counsel assert that Cucco had 19 shifts available to him in the first quarter 1979 (because he quit interim employment in January). The applicable attendance factor is 90 percent, so Cucco is credited with 17.1 shifts in the first quarter of 1979. The total number of fully paid shifts for the vacation credit year was thus 93.2. Disregarding the fraction, Cucco is entitled to a vacation credit of 7.75 days with pay accumulated during the vacation credit year.

As previously noted, when the parties during the hearing agreed upon the backpay and pension benefits to which employees Martin, Randolph, Everhart, Woodruff, Burrows, and Oberg were entitled, they reserved the issue of what vacation benefits, if any, were due to these six employees. Respondent Hearst, in its brief, asserts that the vacation credits of these six employees "cannot be calculated" because "no evidence was introduced at the hearing regarding the number of fully paid shifts for each of these six." The General Counsel notes that the issue was reserved, but does not thereafter discuss it.

The Board found that each of these six employees was discriminatorily terminated in 1976. The record indicates that each of them had been employed more than 4 years at the time. In the absence of evidence to the contrary I infer that Respondent did not offer them reinstatement until early 1979, after the decision of the court of appeals.<sup>10</sup> In these circumstances, the presumption would be that these employees are entitled to some amount of vacation benefits, on the same basis as Czarnowsky and Cucco. However, as Respondent Hearst points out, in the absence of some evidence of the absentee rate of each of these employees, it is impossible to calculate the entitlement of each of them to vacation benefits. The burden of establishing the discriminatee's right to employment benefits is on the General Counsel. In the circumstances, I see no alternative but to recommend dismissal of the General Counsel's claim for vacation benefits for these six employees.

<sup>10</sup> Czarnowsky, Cucco, and Cardozo were sent letters in March 1979 advising that they could be reinstated. I am aware that Respondent sent letters, of a somewhat different kind, in 1977 to Richter and Martinez advising them to the same effect. No reason is given for these early letters.

There remains, apparently, one further problem with respect to the vacation benefits due Czarnowsky and Cucco. These benefits have not been converted into dollar amounts by the backpay specification, or by the General Counsel or the Respondent. The General Counsel refers to it as an "additional and distinct item of compensation owed the employees." So far as I am aware neither the bargaining agreement, nor the record, specifies the rate or rates of pay to be used in computing vacation pay which has been earned but not taken. If the parties are otherwise unable to agree on the rate, I would apply the rate in effect at the date of the employee's return to work which is applicable to the shift that the discriminatee was working when terminated.

#### G. Personal Leave Days

The backpay specification alleges that the employees involved in the buyout who are reinstated are entitled to "[p]aid personal leave" in the amount of the individual's straight time rate of pay for three shifts. The applicable contract provides that employees for 3 years or more are entitled to such benefit in an annual period beginning July 1 (see G.C. Exh. 3, sec. 69(a), *et seq.*). Apparently by analogy to the vacation benefits, the Regional compliance officer testified that the employees were entitled to receive 3 days of leave with pay in 1979, after their return for work, for leave earned in 1978. The analogy is not accurate, however. As I read the contract (section 69(d)), the leave "must be taken in the year in which entitlement occurs or be cancelled."<sup>11</sup> It has previously been found that the employees involved are entitled to be paid for all the time they would have been available for work during the backpay period. If it were also to be found that these employees are entitled to three shifts' pay in addition, for personal leave they could not take during the year 1978, these employees would then receive a benefit which they could not have received if they had been working.

For this reason I shall recommend dismissal of this allegation of the backpay specification.

#### H. Pension Contributions

The General Counsel contends that Respondent Hearst is obligated, pursuant to the applicable bargaining agreements, to make contributions to the ITU Pension fund of \$2.40<sup>12</sup> per "fully paid shift" that Czarnowsky and Cucco would have worked during the backpay period. As has been noted, it was held in the preliminary Decision that the number of "fully paid shifts" in the backpay period are the number of shifts available to be worked reduced by the individual's absentee factor.

The computation of pension contributions owed on behalf of Czarnowsky is relatively straightforward. The parties are agreed that the number of shifts available for Czarnowsky to work during the backpay period was 697 (see Czarnowsky's backpay computation above). Czar-

<sup>11</sup> Compare the previous bargaining agreement (G.C. Exh. 2, sec. 72(b)) which provided for payment to the employee for unused leave.

<sup>12</sup> Respondent Hearst and the General Counsel stipulated to this rate of contribution.



nowsky's attendance percentage, as previously found, is 87 percent. Thus the number of fully paid shifts available during his backpay period would be 606.39. Disregarding the fraction as less than a fully paid shift, the pension contribution on behalf of Czarnowsky would be \$1,454.40 (606 shifts times \$2.40).

The computation of pension contributions on behalf of Cucco is complicated by his pattern of disability during the backpay period, as has been noted. Both Hearst and the General Counsel in their computations reduce Cucco's available shifts by his periods of disability as well as by an agreed absentee factor, although they do not agree on the periods of disability to be deducted. Based on my analysis of the evidence (see discussions of Cucco's backpay and vacation benefits above) and the parties' briefs, I find that pension contributions for Cucco should be computed as follows: beginning with the third quarter of 1976 through the first quarter of 1978, Cucco had 375 available shifts (39 in the third quarter of 1976; 65 each in the fourth quarter of 1976, and in the first and second quarters of 1977; 61 shifts in the third quarter of 1977; 50 shifts in the fourth quarter of 1977; and 30 shifts in the first quarter of 1978), which are reduced by an attendance percentage of 80 percent, giving 300 fully paid shifts through the first quarter of 1978. Cucco further had 65 available shifts in the fourth quarter of 1978 and 19 shifts in the first quarter of 1979 for a total of 84 shifts reduced by an attendance factor of 90 percent to give 75.6 fully paid shifts. Disregarding the fraction, Cucco thus had 375 fully paid shifts during the backpay period. Respondent Hearst thus is obligated to contribute \$900 to the pension fund on behalf of Cucco.

### III. ISSUES INVOLVING RESPONDENT ABELL

#### A. Uncontested Employees

The backpay specification lists 34 employees of Respondent Abell as participating in the buyout. As to seven of these, Diann Davis, Edward H. Davis, Tito Mirafior, John Pearlman, Ivory W. Pulley, James R. Taylor, and Douglas Smith, the General Counsel agrees that Respondent Abell is in compliance with the Board's Order.

#### B. Employees Who Refused Reinstatement

The record shows that the following 12 Abell employees refused reinstatement: Leonard Bankert, Roy D. Canapp, Glenda Fogle, Fred J. Hammond, Bernie Lit, Jr., Joseph T. McComas, Richard Nelson, William L. Price, Leroy Stirewalt, Geraldine Thornton, Harris A. Welcom, and Thomas Wiggins. Respondent also lists Paul F. Moran and Delores T. Peacock as having refused reinstatement.<sup>13</sup> Since they are not mentioned in the General Counsel's brief I assume for the purpose of this decision that they refused reinstatement. Respondent's brief also lists R. A. Troestrum in this group. He will be treated separately hereunder.

For reasons set forth in the preliminary Decision, I find that employees who refused reinstatement are not

entitled to backpay. The General Counsel does not claim that they are entitled to fringe benefits.

#### C. Employees Desiring Reinstatement But Unable To Make Restitution

This issue is somewhat more complicated than I appreciated at the time of the preliminary Decision and I have reconsidered it in the light of the more extensive discussion in the parties' brief. Two employees involved in this matter Richard Eure and Gertrude Parker were reinstated pending computation by the Regional compliance officer as to whether they owed Respondent Abell restitution of the excess of the buyout amount over net backpay owed to them. Eure and Parker were unable to pay the calculated excess amount, and though each made offers to repay the amount on an installment basis, Respondent Abell rejected those offers, insisting on full repayment before permitting Eure and Parker to return to work. Respondent has placed each on unpaid leave of absence pending full repayment of the amount due. One employee, Faye Flythe, has paid the full amount calculated by the Compliance Officer and has been reinstated. Another employee, Jack Wetherson has been reinstated, apparently after reimbursing Respondent. Respondent states that it reserves the right to increase the amounts which it seeks as due from each of these or from other employees as a result of the findings made in this case.<sup>14</sup>

The General Counsel argues that although the Board's Order requires repayment of the amount of the buyouts which exceeds the employee's backpay "as a condition of his reinstatement," there is nothing in that Order "that requires full, up-front reimbursement of the excess." The General Counsel contends that Respondent Abell should "be directed to . . . offer Parker and Eure the opportunity to return to their former positions. If such offer is accepted, Respondent and the employees should be directed to enter into mutually agreeable arrangements for the repayment . . . ." Respondent, of course, does not agree.

I agree with the General Counsel that there is nothing in the Board's Order, or in the court's opinion that specifies when or how reimbursement of the excess buyout is to be made. It seems to me, however, that a reasonable interpretation of the Order would be to require full reimbursement in advance of reinstatement in cases where immediate lump-sum payments of the buyout were made in the first instance, but to require only periodic payments in the same ratio as Respondent made periodic payments of the buyout to the employees in the first instance. While I believe that the resolution of the problem which the General Counsel desires is sound and should be encouraged, since it appears that Parker and Eure accepted lump-sum payments of the buyout, I do not feel justified in recommending the Order which the General Counsel suggests for Parker and Eure.

However, since these employees have demonstrated a "desire" to return to work within the meaning of the Board's Order, they are clearly entitled to credit for

<sup>13</sup> Respondent also lists four names not mentioned in the backpay specification. I have disregarded them.

<sup>14</sup> Respondent Abell contends that it reinstated Leroy James without requiring reimbursement in advance and has been left without reasonable means of obtaining repayment when James was discharged thereafter.

backpay (which in these cases is wiped out by the buyout) and to fringe benefits on the same basis as other employees who accepted Respondent's offer of reinstatement.

#### *D. R. A. Troestrum*

The parties are agreed that they have been unable to locate Troestrum since the buyout. Respondent Abell sent him a letter in January 1979, which was returned, marked "No forwarding address." Since Troestrum's situation is the same as that of Hearst employees Martinez and Cardoza, considered previously, I will recommend the same remedy as to Troestrum.

#### *E. Problems in Backpay Computation*

It is, of course, unnecessary under the findings made above to compute backpay or benefits for the 14 employees who refused reinstatement, or the 7 as to whom Respondent is in compliance or for Troestrum. Backpay and benefits will be computed for Parker, Eure, Flythe, James and for the remaining 8 employees: Jeffrey D. Buckmeier, Deborah V. Nash, W. James Neeld, Aldora M. Singleton, William E. Staubs, John L. Strosnider, Joseph P. Trainor, and Jack Wetherson.

In computing backpay, however, there continues to be a dispute over the proper absentee factor to be used to adjust gross backpay as discussed below.

##### *1. The absenteeism issue*

The parties are agreed that each discriminatee's gross backpay for the backpay period should be adjusted to reflect that employee's anticipated absenteeism. Respondent Abell and the General Counsel are also agreed that this absentee percentage may be determined by reference to the employees' average number of absences in the years 1974-75 and 1975-76 (these averages, computed by Respondent, are listed in Charging Party Exh. 2). The parties are in disagreement, however, as to whether 25 shifts (20 vacation shifts, 3 for personal leave and 2 holidays)<sup>15</sup> should be excluded from the 260 maximum number of work shifts in a year in computing the absentee percentage. Though they are paid for these 25 shifts, the employees are prohibited from working on those days. As discussed in the preliminary Decision, I agreed with Respondent Abell that the 25 shifts should be excluded as they obviously are not part of the employees' work year, but in fact constitute benefits to which the employees are entitled in the form of time off with pay.

However, in coming to this conclusion, I attached two conditions, (1) that these 25 shifts not be included in computing the gross backpay figure diminished by the absentee factor, and (2) that the value of these 25 shifts be added to the gross backpay figure after it has been diminished by the absentee factor. In that way, the 25 shifts would be treated as additional benefits, and not part of the actual work year for these purposes. These 25 shifts are hereinafter referred to as "benefit shifts."

The General Counsel objects to the decision that the absentee percentage be based on a work year of 235

work shifts rather than 260. Respondent Abell has used absentee ratios based on a 235-shift work year in making its computations, but has failed to treat the 25 extra benefit shifts separately for the purpose of backpay computations as I held. A few rough calculations have convinced me that this oversight can make a significant difference in the result. Since it is obviously impossible for me to determine when each employee would have taken his/her benefit shifts each year, and at what rate of pay (the shift rate changes twice a year), I have adopted the following formula: I have allotted the 25 days each year among the 4 quarters as equally as possible, and have allotted proportionate amounts to the quarters at the beginning and end of the backpay period where these are not full quarters. Thus I will assume for the purposes of this Decision that the employee was given 6 days off with pay in the first, second, and third quarters of the year and 7 days off in the fourth quarter of that year. These days are not to be included in determining the backpay amount which is diminished by the appropriate absentee factor, but these days off multiplied by the shift rate for that quarter shall be added to that figure after it has been diminished by the absentee factor, to give the gross backpay figure for the employee involved. I am well aware that it could be argued that in actual practice, the 25 benefit shifts would not be distributed in this fashion. However, on the state of this record, I find that this formula is required to reasonably compute backpay on the basis of the absentee factor sought by Respondent with which I have agreed as set forth in the preliminary Decision.

##### *2. Payments in lieu of Blue Cross coverage as part of the buyout*

Some of the employees, but not all, who accepted the buyout also accepted Respondent's offer of \$800 in lieu of a year's Blue Cross coverage. Respondent Abell contends that for the employees who accepted the \$800 this amount should be included in the buyout amount. The Regional Compliance Officer did not include this \$800 in the buyout, essentially on the basis that these employees were entitled to the year's Blue Cross coverage, quite apart from the buyout, and when they chose the \$800 they only received compensation for a benefit to which they were otherwise entitled, and, conversely, relieved Respondent of an obligation.<sup>16</sup>

Respondent, however, contends that this \$800, which was given to some employees at the same time as the buyout, is to be returned under the terms of the Board's Decision and Order in this case, 243 NLRB 171, which states: "Interim earnings for an employee who was unlawfully induced to retire early but who desires to return to work pursuant to this Order shall include any payments received pursuant to the early retirement plan." (Emphasis supplied.) Upon consideration of the entire proceeding in this matter, it is clear to me that the \$800 payment in lieu of Blue Cross coverage was not a pay-

<sup>15</sup> It is noted that this number was incorrectly stated in the preliminary Decision to be 35.

<sup>16</sup> At the same time, Respondent also gave the employees a check for accrued vacation earned but which they were unable to take. The compliance officer deducted that amount, not because it was part of the buyout, but in order to avoid duplicate payment to the employees.

ment made pursuant to the early retirement plan, nor did the court or the Board intend that it be returned. The return of the buyout was required to prevent those employees who wished to cancel their arrangement with Respondent from becoming unjustly enriched. This is not so with respect to the payment to the employees for which they gave up their right to Blue Cross coverage. I therefore find that the \$800 payment for this purpose should not be deducted from gross backpay.

#### F. Individual Backpay Computations

##### 1. Jeffrey D. Buckmeier

Buckmeier received \$15,000 in a lump sum for his buyout. He also received \$1,605.03 for unused vacation.<sup>17</sup> In the following table computing Buckmeier's backpay, the parties are agreed on the total number of shifts available to be worked, the wage rates per shift, the amounts of interim earnings, and the penalties assessed against Buckmeier for not diligently seeking, or for terminating interim employment. In this table and in the ones set forth hereinafter for other employees, the backpay calculation is as follows: The first column identifies the quarters and years for the backpay period. The second

column lists the number of benefit shifts attributable to that quarter, as previously discussed (6 shifts in the first, second, and third quarters in each year, 7 shifts in the fourth quarter, and a proportionate amount for the first and last quarters of the backpay period). The third column sets forth the amount of shifts available for work that quarter (the maximum number less the number of benefit shifts). The fourth column is the wage rate, which is multiplied by the number of shifts in the third column. The total of this computation is multiplied by the attendance percentage of the employee involved (as previously discussed, Respondent's figures for this are accepted) set forth in the fifth column. The result of this calculation is set forth in column 6 as a subtotal. The number of shifts in column 2 (the benefit shifts) is multiplied by the wage rate to obtain the value of the benefit shifts allocated to that quarter, which is set forth in column 7,<sup>18</sup> and when added to the subtotal in column 6 comprises gross backpay. From this, in each quarter there has been deducted the employee's interim earnings for that quarter and a portion of the buyout sum which together equal the gross backpay (to the point that the buyout sum for the employee is exhausted).

#### JEFFREY D. BUCKMEIER - Buyout \$17,405.03

Qtrs.	Benefit Shifts	Reg. Shifts	Wage Rate	Attendance	Sub Total	Value Benefit Shifts	Gross Backpay	Interim Earnings	Buyout	Net Backpay
3Q76	4	41	58.10	.915	\$2179.62	\$232.40	\$2412.02	48.00	\$2364.02	0
4Q76	7	58	58.10	.915	3083.37	406.70	3490.07	1854.00	1636.07	0
1Q77	6	59	60.30	.915	3255.30	361.80	3617.10	696.00	2921.10	0
2Q77	6	59	60.30	.915	3255.30	361.80	3617.10	388.00	3229.10	0
3Q77	6	53	62.10	.915	3011.54	372.60	3384.14	1526.00	1858.14	0
4Q77	7	0	62.10	0	0	434.70	434.70	0	434.70	0
1Q78	6	0	64.30	0	0	385.80	385.80	0	385.80	0
2Q78	6	12	64.30	.915	706.01	385.80	1091.81	404.00	687.81	0
3Q78	6	59	66.10	.915	3568.41	396.60	3965.01	1367.00	2598.01	0
4Q78	7	58	66.10	.915	3507.93	462.70	3970.63	2350.00	489.80	1130.83
1Q79	2	24	70.10	.915	1539.40	140.20	1679.60	188.00	0	1491.60
Total Net backpay due										\$2,622.43

**Pension Contributions.** The parties are agreed that Respondent Abell is obligated to contribute \$2.20 for each fully paid shift (each shift in the quarter reduced by the appropriate attendance percentage). The parties are agreed that for the purpose of pension contributions, Buckmeier had 473 shifts in the backpay period. The attendance percentage in his case is .915. This would give 432.8 shifts. Disregarding the fraction as less than a fully

paid shift, this gives \$950.40 as the amount of pension contribution to be made on behalf of Buckmeier.

**Vacation benefits.** Employee vacation benefits are also computed on the basis of fully paid shifts, as has been noted. To recapitulate: employees with the seniority here involved are entitled to 20 shifts off with pay if they work 215 fully paid shifts in a 12-month period from March 1 through the last of the following February.

<sup>17</sup> This is the sum asserted by the General Counsel in his computations attached to his brief. Though Respondent's brief asserts \$1,665.03 for unused vacation, this is obviously a typographical error, inasmuch as Respondent states that on the date of his termination, Buckmeier received

\$17,405.03, which included \$15,000 and \$800 cash payment in lieu of medical insurance coverage, as well as the sum for unused vacation.

<sup>18</sup> The value of the employee's benefit days for the quarter has been included in column 7 and as gross backpay for the quarter even in the quarters in which the employee was otherwise disqualified, on the basis that the employee is entitled to these days with pay, even when he does not work.

Those who work less than 215 fully paid shifts receive 1 day of paid vacation for each 12 paid shifts worked during that period.

The parties are agreed that from March 1, 1978, through February 28, 1979 (the vacation credit year), the maximum number of shifts Buckmeier might have worked was 174. This figure adjusted by an attendance ratio of .915 gives 159 fully paid shifts (disregarding the

fraction). This is less than 215 shifts, so 159 shifts divided by 12 entitles Buckmeier to 13 days of vacation pay.

## 2. Richard C. Eure

The backpay computation for Eure is as follows:

**RICHARD C. EURE - Buyout \$16,481.55**

Qtrs.	Bene- fit Shifts	Reg. Shifts	Wage Rate	Attend- ance	Sub Total	Value Benefit Shifts	Gross Backpay	Interim Earnings	Buyout	Net Back- pay
3Q76	6	54	58.10	.843	\$2644.83	\$348.60	\$2993.43	0	2993.43	0
4Q76	7	58	58.10	.843	2840.74	406.70	3247.44	796.00	2451.44	0
1Q77	6	59	60.30	.843	2999.14	361.80	3360.94	1990.40	1370.54	0
2Q77	6	59	60.30	.843	2999.14	361.80	3360.94	2196.04	1164.90	0
3Q77	6	59	62.10	.843	3088.67	372.60	3461.27	2629.60	831.67	0
4Q77	7	58	62.10	.843	3036.32	434.70	3471.02	2169.60	1301.42	0
1Q78	6	59	64.30	.843	3198.09	385.80	3583.89	3115.54	468.35	0
2Q78	6	59	64.30	.843	3198.09	385.80	3583.89	3469.18	114.71	0
3Q78	6	59	66.10	.843	3287.62	396.60	3684.22	3604.38	79.84	0
4Q78	7	58	66.10	.843	3231.89	462.70	3694.59	3604.38	90.21	0
1Q79	5	45	70.10	.843	2659.24	350.50	*3059.74	2755.86	303.88	0
Total Buyout allocated									\$11,170.391	
Excess buyout over gross backpay and interim earnings									5,311.16	

\*Includes \$50 medical expenses

**Pension contributions.** The parties are agreed that for the purpose of computing pension contributions owed on behalf of Eure during the backpay period he had a maximum of 695 shifts subject to adjustment for absenteeism. His attendance percentage was .843. This gives 585.9 shifts. The fractional shift is to be disregarded. The agreed contribution per fully paid shift is \$2.20. The amount of pension contribution to be made on behalf of Eure is \$1,287.

**Vacation benefits.** From March 1, 1978, through February 28, 1979 (the vacation credit year), the maximum number of shifts for computation of vacation benefits was 261 shifts. His attendance factor was .843, giving 220 fully paid shifts. Since this is more than 215 shifts, Eure is entitled to 20 vacation days with pay.

Respondent argues that Eure, as well as Flythe, Parker, Wetherson and James, is not entitled to any benefits under the Board's Order since, though he desired reinstatement, he was unable to repay the buyout and thus is not entitled to reinstatement. I have dealt with this contention in an earlier section of this Decision.

## 3. Fay C. Flythe

Flythe terminated on June 28, 1976. The compliance officer therefore credited her with two shifts in the second quarter of 1976. Respondent's witness Banach testified that these 2 days were off days and should not be in the computation. The General Counsel notes that no supporting detail was offered and contends that any doubt should be resolved against Respondent. While more detail would be preferable, I see no reason to disregard Banach's testimony which is not attacked on the record. The parties are in disagreement as to Flythe's interim earnings in the third quarter of 1977. This apparently results from an adjustment Respondent made to conform with tax return totals supplied by Flythe. I have therefore accepted Respondent's figure in this instance.

**FAYE C. FLYTHE - Buyout \$16,501.33**

Qtrs.	Bene- fit Shifts	Reg. Shifts	Wage Rate	Attend- ance	Sub Total	Value Benefit Shifts	Gross Backpay	Interim Earnings	Buyout	Net Back- pay
3Q76	6	59	58.10	.889	3047.40	348.60	3396.00	2,191.36	1204.64	0
4Q76	7	58	58.10	.889	2995.75	406.70	3402.45	2,492.26	910.19	0
1Q77	6	59	60.30	.889	3162.80	361.80	3524.60	2,609.77	914.83	0
2Q77	6	59	60.30	.889	3162.80	361.80	3524.60	2,599.61	924.99	0
3Q77	6	59	62.10	.889	3257.20	372.60	3629.80	2,655.16	974.64	0
4Q77	7	58	62.10	.889	3202.00	434.70	3636.70	2,884.86	751.84	0
1Q78	6	59	64.30	.889	3372.60	385.80	3758.40	2,636.67	1121.73	0
2Q78	6	59	64.30	.889	3372.60	385.80	3758.40	2,762.44	995.96	0
3Q78	6	59	66.10	.889	3467.01	396.60	3863.61	2,819.26	1044.35	0
4Q78	7	58	66.10	.889	3408.25	462.70	3870.95	2,839.94	1031.01	0

Qtrs.	Bene- fit Shifts	Reg. Shifts	Wage Rate	Attend- ance	Sub Total	Value Benefit Shifts	Gross Backpay	Interim Earnings	Buyout	Net Back- pay
1Q79	5	45	70.10	.889	2804.35	350.50	3154.85	2,291.37	863.48	0
Total buyout allocated									\$10,737.66	
Excess of buy-out over gross backpay and earnings									\$5,763.67	

*Pension contributions.* Flythe's maximum shifts for computation of pension contributions are 700; adjusted by an attendance factor of .889, she has 622 fully paid shifts in the backpay period. At \$2.20 per shift, Respondent owes \$1,368.40 in pension contributions on Flythe's behalf.

*Vacation benefits.* Flythe's maximum number of shifts during the vacation credit year for computation of vacation benefits is 261; adjusted by .889, Flythe has 232 fully paid shifts during the vacation credit year. Since this exceeds 215 shifts, Flythe is entitled to 20 days' vacation with pay.

#### 4. Leroy H. James

From the time James terminated from Respondent's employ in June 1977 until early in the year 1978, James was occupied with a printing business he and three associates sought to establish in a small community in Pennsylvania. James invested his \$15,000 buyout money in this project. The business made no profit and, at the end of 1977, it became necessary to liquidate the business. From June until James left Pennsylvania, apparently in February 1978, his basic living expenses and those of his associates were taken care of by the business. All of them lived in the same house and apparently ate together. Gasoline used in their personal automobile on behalf of the business was paid by the business. When the business was liquidated, James received \$3,000 as his share, after creditors were paid. Respondent contends that James should be disqualified for this entire period because he produced no records, and that the \$3,000 which he received should be considered interim earnings. However, James did explain why he did not have the business records and gave the name of the business attorney as a source of information. It is well established that self-employment constitutes an acceptable method of interim employment during the backpay period. It is not required that the enterprise be successful. The \$3,000 which James received as his share of the defunct enterprise was clearly distribution of capital not income.

There remains the problem of the living expenses James received from the business during this period, which may be considered income. The General Counsel argues, rightly, that the burden was on Respondent to show the value of this income. It has not done so. Nevertheless, I do not wish to ignore the issue on that basis.

Based on the meager information available, and considering the communal nature of the living arrangements of the business associates in Pennsylvania, it seems to me that the value of James' share of these arrangements cannot have been less than \$20 a week, or a minimum of \$260 a quarter, and I so find.

Upon his return to Baltimore from Pennsylvania, James unsuccessfully sought work until July 1977. From July until September 1977, James was in Mississippi taking care of a dying relative. The General Counsel concedes that James should be disqualified for 10 weeks in the third quarter 1977, apparently taking the position that in the last part of that quarter James returned to Baltimore and was actively seeking work. There is evidence to support that position. Respondent argues that he should be disqualified for the entire quarter. Inasmuch as there is written evidence that James was back in Baltimore seeking work by September 7, 1977, I find that James should be disqualified for only 10 weeks in that quarter.

Respondent also contends that \$120 which James received for working a catered affair while in Mississippi, and \$800 he won at the race track on a trip back to Baltimore during his sojourn in Mississippi should be treated as interim earnings during that period. Assuming that race track winnings may be treated as interim earnings—which I do not decide—both of these receipts occurred during the period in which James was disqualified from gross backpay and I find it not reasonable to charge him with interim earnings during such a period.

From October 1977 through June 1978 the compliance officer assessed a 50-percent penalty against James, and from July 1978 until the end of the backpay period a 75-percent penalty for less than diligent search for work. Respondent argues, more broadly, that James should be disqualified from any backpay during the entire backpay period. I cannot agree with that position. I accept the findings of the compliance officer. In the following table I have reduced James' gross backpay by 50 percent in the fourth quarter of 1977 and the first and second quarter of 1978, and have reduced gross backpay 75 percent in the third and fourth quarters of 1978 and the first quarter 1979.

#### LEROY H. JAMES - Buyout \$16,299.59

Qtrs.	Bene- fit Shifts	Reg. Shift	Wage Rate	Attend- ance	Sub Total	Value Benefit Shift	Gross Backpay	Interim Earnings	Buyout	Net Back- pay
2Q76	2	18	56.30	.636	644.52	112.60	757.12	80.00	677.12	0
3Q76	6	59	58.10	.636	2180.14	348.60	2528.74	260.00	2268.74	0
4Q76	7	58	58.10	.636	2143.19	406.70	2549.89	260.00	2289.89	0

Qtrs.	Bene- fit Shifts	Reg. Shift	Wage Rate	Attend- ance	Sub Total	Value Benefit Shift	Gross Backpay	Interim Earnings	Buyout	Net Back- pay
1Q77	6	59	60.30	.636	2262.70	361.80	2624.50	*100.00	2524.50	0
2Q77	6	59	60.30	.636	2262.70	361.80	2624.50	0	2624.50	0
3Q77	1	14	62.10	.636	552.94	62.10	615.04	0	615.04	0
4Q77	7	58	62.10	.636	2290.74	434.70	1362.72	0	1362.72	0
1Q78	6	59	64.30	.636	2412.79	385.80	1399.30	0	1399.30	0
2Q78	6	59	64.30	.636	2412.79	385.80	1399.30	0	1399.30	0
3Q78	6	59	66.10	.636	2480.34	396.60	719.24	0	719.24	0
4Q78	7	58	66.10	.636	2438.30	462.70	725.25	0	419.24	306.01
1Q79	5	45	70.10	.636	2006.26	350.26	589.19	0	589.19	

Net backpay due

\$895.20

\*James clearly returned to Baltimore by February 10, 1977. I have charged him with 5 weeks at \$20 per week to that time.

*Pension contributions.* In computing the maximum shifts in the backpay period for James, I count only 97.5 shifts for the fourth quarter of 1977 and the first and second quarters of 1978 together (50 percent of 197 shifts); and count 45 shifts for the third and fourth quarter 1977 and the first quarter of 1979 together (25 percent of 180 shifts). On the basis of 437.5 maximum shifts during the backpay period, adjusted by an attendance rate of .636, James has 278 fully paid shifts for the purpose of computation of pension contributions. At \$2.20 per shift, Respondent owes \$611.60 in pension contributions on behalf of James.

*Vacation benefits.* The maximum possible shifts in the vacation benefit year for the first and second quarters of 1978 are 88; I find James is entitled to 44 shifts in these

quarters for the purposes of computation of vacation benefits. The maximum number of possible shifts in the vacation benefit year for the third and fourth quarters of 1978 and the first quarter of 1979 are 173; I find James is entitled to 43.25 shifts in those quarters. On the basis of 131.25 maximum shifts during the vacation benefit year, adjusted by .636, James has 83 fully paid shifts for the purpose of computing vacation benefits. Divided by 12, James is entitled to 6.9 paid days of vacation.

#### 5. Deborah V. Nash

The backpay computations for Nash are as follows:

DEBORAH V. NASH - Buyout \$15,703.75

Qtrs.	Bene- fit Shifts	Reg. Shift	Wage Rate	Attend- ance	Sub Total	Value Benefit Shift	Gross Backpay	Interim Earnings	Buyout	Net Backpay
2Q76	1	13	56.30	.732	535.75	56.30	592.05	0	592.05	0
3Q76	6	24	58.10	.732	1020.70	348.60	1369.30	0	1369.30	0
4Q76	7	58	58.10	.732	2466.69	406.70	2873.39	0	2873.39	0
1Q77	6	59	60.30	.732	2604.24	361.80	2966.04	0	2966.04	0
2Q77	6	59	60.30	.732	2604.24	361.80	2966.04	810.00	2156.04	0
3Q77	6	59	62.10	.732	2681.97	372.60	3054.57	645.02	2409.55	0
4Q77	7	58	62.10	.732	2636.52	434.70	3071.22	2028.58	1042.64	0
1Q78	6	59	64.30	.732	2776.99	385.80	3162.79	1741.91	1420.88	0
2Q78	6	59	64.30	.732	2776.99	385.80	3162.79	1874.20	873.36	414.73
3Q78	6	59	66.10	.732	2854.73	396.60	3251.33	2203.52	0	1048.01
4Q78	7	59	66.10	.732	2854.73	462.70	3317.43	2113.66	0	1203.77
1Q79	5	45	70.10	.732	2309.09	350.50	2659.59	1841.10	0	818.49

Net backpay due

\$3,485.00

*Pension contributions.* On the basis of 679 maximum shifts during the backpay period, adjusted by an attendance ratio of .732, Nash has 497 fully paid shifts for the purpose of computation of pension contributions. At \$2.20 per shift, Respondent owes \$1,093.40 in pension contributions on behalf of Nash.

*Vacation benefits.* On the basis of 261 maximum shifts during the vacation benefit year, adjusted by .732, Nash has 191 fully paid shifts for the purpose of computing vacation benefits. Divided by 12 Nash, is entitled to 15.9 days of paid vacation.

#### 6. James W. Neeld III

There is a problem with respect to whether certain social security disability payments received by Neeld during the backpay period should be included in interim earnings. Neeld, according to the compliance officer is a deaf mute, which, of course, severely limited his employment opportunities away from Respondent. As noted, when unable to secure other employment, he applied for and received disability benefits from Social Security. The compliance officer testified that he was in a quandary as to how to handle these payments and included them in

interim earnings because that seemed "fair" to him in the circumstances.

So far as I am aware, the Board has never dealt with such payments. Disability benefits of this sort, as I understand the system, are available only to employees who have qualified by making proper payments into the system for the proper length of time and who are presently disabled from gainful employment, but only so long as they are disabled. In a sense, the employee is collecting on insurance which he has secured by his contribu-

tions. However, these are not payments made because he was injured, but because his disability prevents him from deriving income from employment. As such it is analogous to that part of workmen's compensation payments that are a substitute for lost wages and thus are properly included in interim earnings, as both the General Counsel and Respondent have done.

JAMES W. NEELD III - Buyout \$16,187.08

Qtrs.	Benefit Shifts	Reg. Shift	Wage Rate	Attendance	Sub Total	Value Benefit Shift	Gross Backpay	Interim Earnings	Buyout	Net Backpay
2Q76	0	3	57.30	.76	130.64	0	130.64	0	130.64	0
3Q76	6	59	59.10	.76	2650.00	354.60	3004.64	0	3004.64	0
4Q76	7	58	59.10	.76	2605.13	413.70	3018.83	70.06	2948.77	0
1Q77	6	59	61.30	.76	2748.69	367.80	3116.49	0	3116.49	0
2Q77	6	59	61.30	.76	2748.69	367.80	3116.49	0	3116.49	0
3Q77	6	59	63.10	.76	2829.40	378.60	3208.00	198.08	3009.92	0
4Q77	0	0	-----	---	-----	-----	-----	0	-----	0
1Q78	0	0	-----	---	-----	-----	-----	*0	-----	0
2Q78	6	59	**65.30	.76	2928.05	391.80	3319.85	1831.60	860.13	628.12
3Q78	4	***39	67.10	.76	1988.84	268.40	2257.24	1925.88	0	331.36
4Q78	5	38	67.10	.76	1937.85	335.50	2273.35	****2717.04	0	0
1Q79	5	45	71.10	.76	2431.62	355.50	2787.12	***1857.78	0	929.34
Net backpay due										\$1,888.82

\*Though all parties agree that Neeld should be disqualified from receiving backpay for this quarter, Respondent claims Neeld had \$478.90 in earnings during this period from Social Security disability benefits. I have disregarded this. Either these payments were not income or Neeld should not have been disqualified for the entire quarter.

\*\*The wage rate used by General Counsel for this quarter differs. I believe his rate to be a typographical error.

\*\*\*All parties agree that Neeld should be disqualified for 1 month in this and the following quarter as found by the Compliance Officer. General Counsel would penalize Neeld 20 shifts; Respondent, 22 shifts. Reference to the Compliance Officer's worksheets show he calculated \$2907.76 as Neeld's gross backpay for both quarters (without an absentee factor). At \$67.10 per shift, this indicates that he credited Neeld with approximately 43 shifts, and penalized him 22 shifts. I have therefore accepted Respondent's figure.

\*\*\*\*General Counsel and Respondent differ substantially on these figures. I have accepted the figures on the Compliance Officer's worksheets as closely as I can make them out (the photocopies in evidence are almost illegible).

*Pension contributions.* On the basis of 529 maximum shifts during the backpay period, adjusted by an attendance rate of .76, Neeld has 402 fully paid shifts. At \$2.20 per shift, Respondent Abell owes \$884.40 in pension contributions on behalf of Neeld.

*Vacation benefits.* On the basis of 194 maximum shifts during the vacation benefit year, adjusted by .76, Neeld has 147 fully paid shifts for the purpose of computing vacation benefits. Divided by 12, Neeld is entitled to 12.25 paid vacation days.

#### 7. Gertrude R. Parker

The General Counsel and Respondent are in disagreement over the appropriate absentee factor to be applied in computing Parker's backpay. During the period used to compute the rate of absenteeism of the employees here involved, running from 1974 through 1976, Parker was absent 170 days in the period 1974-75 and 110 days in the period 1975-76. The Region's compliance officer asserted that the 170 days involved an unusual and non-recurring disability and should be disregarded. He used the figure for the 1975-76 period alone to compute Parker's absentee percentage.

In April 1973, Parker slipped on a wet substance at work in Respondent's facility and was seriously injured. She did not return to work until November 1974. She continued to suffer from her injuries and from time to time thereafter lost time from work because of those injuries. Assuming, as I do, that the periods used to compute absentee percentages run from January 1, 1974, to January 1, 1975, and from January 1, 1975, to January 1, 1976, (the dates of the start and end of the periods are not given), it is clear that Parker's absences in 1974-75 were clearly related to her injury at work. I would infer that some of the absences in 1975-76 were also related to those injuries. In the circumstances, I believe that the compliance officer's decision to use 110 days as the figure for Parker's annual absences from work was fair and reasonable. On the basis of a 235-shift work year, I have therefore used .468 as Parker's absentee percentage and .532 as Parker's annual attendance ratio. As in all cases herein, I do not include in the buyout the \$800 received in lieu of insurance coverage.

A troublesome problem involves Parker's interim earnings from employment by the Social Security Administration. It was testified at the hearing that Respondent's figures, which differed from those of the compliance offi-

cer, were derived from Parker's tax returns. Respondent's exhibits containing those figures were received without objection. The tax returns were never offered. The General Counsel suggests, since under either calculation Parker's buyout will exceed backpay, that we use the compliance officer's figures and leave the parties to negotiate acceptable figures. It would be pleasant to be able to do so, but I feel obligated to resolve the issues on the record if I can do so. If the compliance officer's calculations were the only evidence in the record, I would certainly rely on them. However, Respondent's testimony that its exhibit contained Parker's tax return figures must take precedence, though the tax returns themselves would have been more satisfactory evidence.<sup>19</sup> Respondent's Exhibit 17 shows tax return earnings for 1977 to be \$10,348.00. It does not, of course, show earnings by quarters. I have distributed the total equally by quarters. This comes to \$2,587 earnings per quarter. Respondent's

figures for 1978 agree with the General Counsel's except in the fourth quarter where Respondent makes an adjustment, with which I agree, to conform with Parker's tax return. Though Respondent's witness testified that Respondent accepted the compliance officer's figure for Parker's interim earnings for the first quarter of 1979, the compliance officer's worksheets for that quarter shows no earnings while Respondent's exhibit shows a considerable figure. The evidence shows that because Parker quit her interim employment during this quarter, the parties are agreed that she should be credited with working only 15 shifts, i.e., 23 percent, in that quarter. Parker's average quarterly earnings in 1978, the nearest period, was \$2,041.00. I find that 23 percent of this amount—\$469.43—should be assessed as interim earnings for the first quarter 1979. These findings are set forth in the table below.<sup>20</sup>

GERTRUDE R. PARKER - Buyout \$14,771.11

Qtrs.	Benefit Shifts	Reg. Shift	Wage Rate	Attendance	Sub Total	Value Benefit Shift	Gross Backpay	Interim Earnings	Buyout	Net Backpay
3Q76	5	50	57.10	.532	1518.86	285.50	1804.36	368.50	1435.86	0
4Q76	7	58	57.10	.532	1761.88	399.70	2161.58	646.50	1515.08	0
1Q77	6	59	59.30	.532	1861.31	355.80	2217.11	2587.00	0	0
2Q77	6	59	59.30	.532	1861.31	355.80	2217.11	2587.00	0	0
3Q77	6	59	61.10	.532	1917.81	366.60	2284.41	2587.00	0	0
4Q77	7	58	61.10	.532	1885.30	427.70	2313.00	2587.00	0	0
1Q78	6	59	63.30	.532	1986.86	379.80	2366.66	2458.08	0	0
2Q78	6	59	63.30	.532	1986.86	379.80	2366.66	2099.52	267.14	0
3Q78	6	59	65.10	.532	2043.36	390.60	2433.96	2427.84	6.12	0
4Q78	7	58	65.10	.532	2008.73	455.70	2464.43	1178.56	1285.87	0
1Q79	1	14	69.10	.532	514.66	69.10	583.76	469.43	114.33	0
Total buyout allocated									\$4,624.71	
Excess of buyout over gross backpay and earnings									\$11,146.71	

**Pension contributions.** Parker's maximum shifts for computation of pension contributions are 655; adjusted by an attendance factor of .532 she has 348 fully paid shifts in the backpay period. At \$2.20 per shift, she is entitled to \$765.60 in pension contributions on her behalf.

**Vacation benefits.** Parker's maximum number of shifts during the vacation credit year for computation of vacation benefits is 233; adjusted by .532, she has 123 fully paid shifts during the vacation credit year. Divided by 12, Parker is entitled to 10.25 vacation days with pay.

#### 8. Aldora M. Singleton

Among the employees here involved, only in the case of Singleton and John L. Strosnider (considered hereinafter) do the General Counsel and Respondent differ as to the wage rates to be used in computing backpay in every quarter. I cannot account for this. However, Singleton and Strosnider are the only two among this group

who are credited with an extra \$1.00 for every five shifts for working on the lobster shift 1 day each week. Respondent also uses the same wage rates in computing backpay for each (except for the second quarter of 1978, which I assume is a typographical error as to Strosnider). This would indicate that these two, among the employees here involved, share a unique wage scale. I have accepted Respondent's wage rates for Singleton and Strosnider.<sup>21</sup> There are also significant differences between the parties as to Singleton's interim earnings in the first quarter of 1977 and in the first quarter of 1979 (there is also a 45-cent difference in the third quarter of 1978). I am unable to find support for Respondent's figures so I accept the General Counsel's concessions as to interim earnings, derived from the compliance officer's

<sup>19</sup> I am also disturbed by the fact that Respondent's witness also testified that its exhibit, for comparison, showed the figures from the compli-

ance officer's worksheets. The figures shown, allegedly from the compliance officer's worksheets, are not accurate according to my analysis.

<sup>20</sup> This does not mean to foreclose the parties from agreeing on figures which they believe more accurate. I am particularly concerned that the asserted tax return figures are accurate.

<sup>21</sup> If there is an error in this, I assume Respondent and the General Counsel will agree on the correct figures.



worksheets.<sup>22</sup> I have added the lobster shift increment into Singleton's gross backpay in the table that follows.

ALDORA M. SINGLETON - Buyout \$16,117.88

Qtrs.	Bene- fit Shifts	Reg. Shift	Wage Rate	Attend- ance	Sub Total	Value Benefit Shift	Gross Backpay	Interim Earnings	Buyout	Net Backpay
2Q76	1	12	56.50	.86	583.08	56.50	639.58	0	639.58	0
3Q76	2	20	58.30	.86	1002.76	116.60	1119.36	0	1119.36	0
4Q76	7	58	58.30	.86	2908.00	408.10	3316.10	0	3316.10	0
1Q77	6	59	60.50	.86	3069.77	363.00	3432.77	581.00	2851.27	0
2Q77	6	59	60.50	.86	3069.77	363.00	3432.77	1618.94	1813.83	0
3Q77	6	59	62.30	.86	3161.10	373.80	3534.90	1755.00	1779.90	0
4Q77	7	58	62.30	.86	3107.52	436.10	3543.62	1728.41	1815.21	0
1Q78	6	59	64.50	.86	3272.73	387.00	3659.73	1837.00	1822.73	0
2Q78	6	59	64.50	.86	3272.73	387.00	3659.73	1878.00	959.90	821.00
3Q78	6	59	66.30	.86	3364.06	397.80	3761.86	1892.45	0	1869.41
4Q78	7	58	66.30	.86	3307.04	464.10	3771.14	2012.00	0	1759.14
1Q79	5	45	70.30	.86	2720.61	351.50	3072.11	1402.00	0	1670.11

Net backpay due

\$6,120.49

*Pension contributions.* Singleton's maximum shifts for computation of pension contributions are 620; adjusted by an attendance factor of .86 she had 533 fully paid shifts during the backpay period. At \$2.20 per shift, Respondent owes \$1,172.60 in pension contributions on Singleton's behalf.

*Vacation benefits.* Singleton's maximum shifts during the vacation credit year for computation of vacation benefits are 261; adjusted by .86, she has 224 fully paid shifts during the vacation credit year. Singleton is entitled to 20 days' paid vacation.

#### 9. William E. Staubs

For the most part, during the backpay period, Staubs was engaged in a business with an associate. Respondent contends that in at least 2 years the business made a profit with which Staubs should be credited. The business tax returns for those years do show a gross profit for those years, but also show net losses, or no taxable income for those years. At one point Staubs testified that

the business paid for a side of beef for him which he stated was treated on the business' books as a withdrawal of that part of his investment in the business. Based on this Respondent argues that it is reasonable to find that the business supplied food to Staubs' family during the entire backpay period, which should be charged as interim earnings on the basis of the Bureau of Labor Statistics figure for a family of four in the lower budget level for the Baltimore area. On the basis of the record as a whole, I find that Staubs, as he testified received no income from the business during the backpay period. He did receive income from other services as noted in the following table.

There is apparently a minor discrepancy of 60 cents in the amount of Staubs' buyout as claimed by the parties. I have accepted Respondent's higher figure. Respondent and the General Counsel also disagree on the wage rates payable to Staubs during the backpay period. I have accepted Respondent's figures.

WILLIAM E. STAUBS - Buyout - \$16,118.74

Qtrs.	Bene- fit Shifts	Reg.Shift	Wage Rate	Attend- ance	Sub Total	Value Benefit Shift	Gross Backpay	Interim Earnings	Buyout	Net Backpay
3Q76	4	40	58.30	.977	2278.36	233.20	2511.56	0	2511.56	0
4Q76	7	58	58.30	.977	3303.63	408.10	3711.73	0	3711.73	0
1Q77	6	59	60.50	.977	3487.40	363.00	3850.40	0	3850.40	0
2Q77	6	59	60.50	.977	3487.40	363.80	3850.40	0	3850.40	0
3Q77	6	59	62.30	.977	3591.16	373.80	3694.96	0	2194.65	1770.31
4Q77	7	58	62.30	.977	3530.29	436.10	3966.39	116.20	0	3850.19
1Q78	6	59	64.50	.977	3717.97	387.00	4104.97	*116.20	0	2988.77
2Q78	6	59	64.50	.977	3717.97	387.00	4104.97	*1696.78	0	2408.19
3Q78	6	59	66.30	.977	3821.73	397.73	4219.53	475.50	0	3744.03
4Q78	7	58	66.30	.977	3756.96	464.10	4221.06	0	4221.06	
1Q79	5	45	70.30	.977	3090.74	351.50	3442.24	0	3442.24	

Net backpay due

\$22,424.79

\*General Counsel and Respondent differ slightly as to these figures. I have accepted the higher figures.

<sup>22</sup> The largest discrepancy occurs in the first quarter of 1979, where Respondent asserts that 10 weeks should be multiplied by \$259.62 per week income from the interim employer. There is no indication as to

how this figure was derived. According to my calculations, Singleton did not receive this amount of weekly income from that employer in any previous quarter.

Qtrs.	Bene- fit Shifts	Reg.Shift	Wage Rate	Attend- ance	Sub Total	Value Benefit Shift	Gross Backpay	Interim Earnings	Buyout	Net Backpay
Net backpay due										\$22,424.79

\*General Counsel and Respondent differ slightly as to these figures. I have accepted the higher figures.

**Pension contributions.** Staubs' maximum shifts for computation of pension contributions are 679; adjusted by an attendance factor of .977, he has 663 fully paid shifts during the backpay period. At \$2.20 per shift, Respondent owes \$1,458.60 in pension contributions on Staubs' behalf.

**Vacation benefits.** Staubs' maximum shifts during the vacation credit year for computation of vacation benefits are 261; adjusted by .977, he has 254 fully paid shifts during the vacation credit year. Staubs is entitled to 20 days' paid vacation.

#### 10. John L. Strosnider

As has been noted in connection with the computation for Aldora Singleton, I have accepted Respondent's figures as to the applicable wage rates except for the second quarter of 1978. I have included in Strosnider's gross backpay in the table following the applicable incre-

ment for Strosnider's employment on the lobster shift. There is a discrepancy as to Strosnider's interim earnings in the fourth quarter of 1977. Respondent's witness Banach attributes Respondent's higher total for interim earnings to reliance on Strosnider's tax returns, but does not further explain this particular discrepancy. Thus Banach indicates that there is a difference of \$227.54 between the compliance officer's total of interim earnings and the tax return figure ("the difference between \$22,991.64 as shown by [Respondent] and \$22,714.10 as calculated by the NLRB"), but the additional amount claimed by Respondent in the fourth quarter 1977 is \$382.58. Notwithstanding some uneasiness due to the inconsistency in the evidence, I have decided to accept Respondent's contention here based on the testimony that Respondent's figures were derived from the tax returns.

JOHN L. STROSNIDER - Buyout - \$15,739.64

Qtrs.	Bene- fit Shifts	Reg. Shift	Wage Rate	Attend- ance	Sub Total	Value Benefit Shift	Gross backpay	Interim Earnings	Buyout	Net Backpay
3Q76	4	40	58.30	.968	2257.38	233.20	2490.58	0	2490.58	0
4Q76	7	58	58.30	.968	3273.20	408.10	3681.30	292.00	3389.30	0
1Q77	6	59	60.50	.968	3455.28	363.00	3818.28	1071.00	2747.28	0
2Q77	6	59	60.50	.968	3455.28	363.00	3818.28	1256.00	2562.28	0
3Q77	6	59	62.30	.968	3558.08	373.80	3931.88	3661.79	270.09	0
4Q77	7	58	62.30	.968	3497.77	436.10	3933.87	2780.17	1153.70	0
1Q78	6	59	64.50	.968	3683.72	387.00	4070.72	1908.89	2161.83	0
2Q78	6	59	64.50	.968	3683.72	387.00	4070.72	3448.80	621.92	0
3Q78	6	59	66.30	.968	3786.53	397.80	4184.33	3872.04	312.29	0
4Q78	7	58	66.30	.968	3722.34	464.10	4186.45	3913.76	30.37	242.32
1Q79	5	45	70.30	.968	3062.27	351.50	3413.77	892.23	0	2521.54
Net backpay due										\$2,763.85

**Pension contributions.** On the basis of 679 maximum shifts during the backpay period, adjusted by an attendance rate of .968, Strosnider has 657 fully paid shifts for the purpose of computation of pension contributions. At \$2.20 per shift, Respondent owes \$1,445.40 in pension contribution on behalf of Strosnider.

**Vacation benefits.** On the basis of 261 maximum shifts during the vacation benefit year, adjusted by .968, Strosnider has 252 fully paid shifts for the purpose of computing vacation benefits. He is entitled to 20 days' paid vacation.

#### 11. Joseph P. Trainor

The General Counsel contends that Trainor's backpay should not be diminished by an absentee factor inasmuch as he was absent less than 10 times during the base period citing the NLRB Casehandling Manual, Part 3, Sec. 10564(e) which instructs, in effect, that such absence

is *de minimis*, and to be disregarded. Respondent asserts the contrary. While the manual may be useful for other purposes, where the absentee factor is known, and Respondent insists upon it, as here, it should be applied, and I do so.

Trainor's interim earnings present a problem. Out of 12 quarters in the backpay period, the parties disagree as to 6 of them. Respondent's witness Banach testified that Respondent had Trainor's tax returns and Respondent submitted a document in evidence showing the amounts, but did not submit the tax return themselves. No explanation is given for Respondent's division of the total amount into quarters, although the distribution in some quarters matches that of the compliance officer. The total for the years match those in Respondent's Exhibit 21 asserted to have been taken from the tax returns. Under the circumstances, I have accepted Respondent's interim earnings figures.

## JOSEPH P. TRAINOR Buyout \$16,496.64

<i>Qtrs.</i>	<i>Bene- fit Shifts</i>	<i>Reg. Shift</i>	<i>Wage Rate</i>	<i>Attend- ance</i>	<i>Sub Total</i>	<i>Value Benefit Shift</i>	<i>Gross Backpay</i>	<i>Interim Earnings</i>	<i>Buyout</i>	<i>Net Backpay</i>
2Q76	1	7	56.30	.985	388.19	56.30	444.49	0	444.49	0
3Q76	6	59	58.10	.985	3376.48	348.60	3725.08	271.40	3453.68	0
4Q76	7	58	58.10	.985	3319.25	406.70	3725.95	2349.56	1376.39	0
1Q77	6	59	60.30	.985	3504.33	361.80	3866.13	1372.00	2494.13	0
2Q77	6	59	60.30	.985	3504.33	361.80	3866.13	0	3866.13	0
3Q77	4	40	62.10	.985	2446.74	248.40	2695.14	1015.97	1679.17	0
4Q77	7	58	62.10	.985	3547.77	434.70	3982.47	*1887.39	2095.08	0
1Q78	6	59	64.30	.985	3736.79	385.80	4122.59	*2447.52	1087.57	58.75
2Q78	6	59	64.30	.985	3736.79	385.80	4122.59	3501.69	0	620.90
3Q78	6	59	66.10	.985	3841.40	396.60	4238.00	3033.48	0	1204.52
4Q78	7	58	66.10	.985	3776.29	462.70	4238.99	3472.61	0	766.38
1Q79	5	45	70.10	.985	3107.18	350.50	3457.68	3272.19	0	185.49
Net backpay due										\$2,836.04

\*Interim earnings for this quarter includes an amount that the compliance officer labeled "Workmans Comp." The Board has held that such payments are included in interim earnings only to the extent that they are a substitute for earnings, but not to the extent that they constitute damages for injury. *American Mfg. Co. of Texas*, 167 NLRB 520. In the absence of any evidence in the record, I assume that the compliance officer followed the Board's rule.

*Pension contributions.* Trainor's maximum shifts for computation of pension contributions are 687; adjusted by an attendance factor of .985, he has 676 fully paid shifts in the backpay period. At \$2.20 per shift, Trainor is entitled to payment of \$1,487.20 in pension contributions on his behalf.

*Vacation benefits.* Trainor's maximum number of shifts during the vacation credit year for computation of vacation benefits is 261; adjusted by .985 this amounts to 257 fully paid shifts. Trainor is entitled to 20 days vacation with pay.

## 12. Jack Wetherson

The compliance officer testified that certain of Wetherson's income during the backpay period constituted part-time, or supplementary income not deductible from gross interim earnings. Comparison of Respondent's and the General Counsel's computations indicate that they differ on only one such item, \$743.54 assertedly earned from Informatics in the third quarter of 1978. The General Counsel seems to contend that inasmuch as Wetherson quit full-time employment with Informatics in the second quarter of 1978, obtained other full-time employment which continued to the end of the backpay period, and earned only \$743.54 from Informatics in the third quarter and even less from that source in the fourth quarter 1978, the income from Informatics in the third quarter should be treated as supplementary income not deductible from gross backpay. The figure themselves seem to support the General Counsel's position, but one is led to wonder why the General Counsel did not take the same position with respect to \$186.57 earnings from

Informatics in the fourth quarter of 1978, and in regard to \$219.22 earned from Deans in the third quarter of 1978. Perhaps an oversight in the maze of computations.

The record shows Wetherson to be an energetic worker. Even while employed by Respondent he was engaged in supplementary employment (not always monetarily lucrative), but not with the employers here involved. The problem is difficult. Wetherson's employment by Informatics and Deans in the third and fourth quarters of 1978 were clearly not his principal employment. If they are not excluded from interim earnings, we tend to penalize Wetherson for being an energetic employee. However, the burden is on the General Counsel to show that these earnings should be excluded and I do not think the burden has been met.

The General Counsel showed that Wetherson incurred some expenses in obtaining and keeping interim employment which should be deducted from interim earnings. Though Respondent does not refer to these expenses, I am not aware that it attacks their validity. I will deduct these sums.

The General Counsel and Respondent differ on the amounts of some interim earnings. Respondent witness Banach, in identifying Respondent's computations, asserted that they were based on tax returns, or similar information obtained from Wetherson. Where interim employment continued over several quarters, Respondent seems to have allotted amounts to each quarter (to a considerable extent following the amounts shown by the General Counsel). In the table following hereafter, I have accepted Respondent's figures for interim earnings.

## JACK WETHERSON - Buyout \$16,103.90

<i>Qtrs.</i>	<i>Bene- fit Shifts</i>	<i>Reg. Shift</i>	<i>Wage Rate</i>	<i>Attend- ance</i>	<i>Sub Total</i>	<i>Value Benefit Shift</i>	<i>Gross Backpay</i>	<i>Interim Earnings</i>	<i>Buyout</i>	<i>Net Back- pay</i>
3Q76	4	39	57.10	.959	2131.14	228.40	2359.54	218.40	2141.14	0
4Q76	7	58	57.10	.957	3169.39	399.70	3569.09	2621.37	947.72	0

Qtrs.	Bene- fit Shifts	Reg. Shift	Wage Rate	Attend- ance	Sub Total	Value Benefit Shift	Gross Backpay	Interim Earnings	Buyout	Net Back- pay
1Q77	6	59	59.30	.957	3348.26	355.80	3704.06	2079.48	1624.58	0
2Q77	6	59	59.30	.957	3348.26	355.80	3704.06	2674.96	1029.10	0
3Q77	6	59	61.10	.957	3449.89	366.60	3816.49	2186.10	1630.39	0
4Q77	7	58	61.10	.957	3391.42	427.70	3819.12	2131.93	1687.19	0
1Q78	6	59	63.30	.957	3574.11	379.80	3953.91	2190.85	1763.06	0
2Q78	6	59	63.30	.957	3574.11	379.80	3953.91	2904.15	1049.76	0
3Q78	6	59	65.10	.957	3675.74	390.60	4066.34	3244.96	821.38	0
4Q78	7	58	65.10	.957	3613.44	455.70	4069.14	2761.57	1307.57	0
1Q79	5	45	69.10	.957	2975.79	345.50	3321.29	2360.00	961.29	0
Total buyout allocated									\$14,963.18	
Excess Buyout over gross backpay and interim earnings									\$1,140.72	

*Pension contributions.* Wetherson's maximum shifts for computation of pension contributions are 678; adjusted by an attendance factor of .957, he has 648 fully paid shifts in the backpay period. At \$2.20 per shift, Respondent owes \$1,425.60 in pension contributions on Wetherson's behalf.

*Vacation benefits.* Wetherson's maximum shifts during the vacation credit year for computation of vacation benefits is 261; adjusted by .957, Wetherson has 249 fully paid shifts during the vacation credit year. Wetherson is entitled to 20 vacation days with pay.

#### G. Personal Leave Days

For the reasons discussed above in connection with Respondent Hearst, I find that the Abell employees here involved are not entitled to personal leave days in addition to backpay. The contract requires that such days must be taken in the year earned. In fact these days are part of the 25 benefit days which have been separately recompensed as noted above.

#### THE REMEDY

In the following Order, opposite the names of the employees involved, set forth under appropriate column headings, are the net amounts of backpay, medical expenses, vacation benefits, and pension contributions to which the employee is entitled. The number under the heading of vacation benefits shows the number of days of vacation with pay for the number of shifts set forth to which the employee is entitled. The amounts under the heading of pension contributions are the amounts the respondent involved is obligated to contribute to the ITU Negotiated Pension Plan. The amounts under the heading of backpay constitute net backpay to be paid to the designated employee, from which are to be deducted the tax withholding required by Federal and state laws. The Respondent involved shall pay 6-percent interest computed in accordance with *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962), upon each of the amounts and benefits set forth.

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in this case, I hereby issue the following recommended:

#### ORDER

A. The Respondent, The Baltimore News American Division, The Hearst Corporation, its officers, agents, successors, and assigns, shall in accordance with the provisions of the section hereinabove entitled "The Remedy," grant, pay, and contribute the following:

	Backpay	Medical Ex- penses	Vacation Benefits (Days with pay)	Pension Contri- butions
(a) Allan Czarnowsky	\$19,274.86		20 days	\$1454.40
(b) Frederick Cucco	9,014.20	\$1222.45	7.75 days	900.00

(c) Interest to March 21, 1980, on backpay paid to Robert Burrows, Dennis Everhart, John H. Martin, Jr., Carl Oberg, Arthur G. Randolph, and William J. Woodruff, pursuant to agreement noted in Section II A of the above Supplemental Decision.

B. The Respondent, The A.S. Abell Company, its officers, agents, successors, and assigns, shall, in accordance with the provisions of the section hereinabove entitled "The Remedy," grant, pay, and contribute the following:

	Backpay	Vacation Benefits (Days with Pay)	Pension Contri- butions
Jeffrey D. Buckmeier	\$2,622.43	13 days	\$950.40
Richard C. Eure		20 days	1287.00
Faye C. Flythe		20 days	1368.40
Leroy H. James	895.00	6.9 days	611.60
Deborah V. Nash	3,485.00	15.9 days	1093.40
James W. Neeld III	1,888.82	12.25 days	884.40
Gertrude R. Parker	10.25 days	765.60	
Aldora M. Singleton	6,120.49	20 days	1172.60
William E. Staubs	22,424.79	20 days	1458.60
John L. Strosnider	2,763.85	20 days	1445.40
Joseph P. Trainor	2,836.04	20 days	1487.20
Jack Wetherson		20 days	1425.60

C. Jurisdiction is retained for 1 year from the date of this Order in respect to the claims for backpay for Francisco Cardoza, Lee Martinez, and R. A. Troestrum, with leave to the General Counsel to move to reopen these proceedings as to any or all of said employees within that time in accordance with the discussions as to these employees in the above Supplemental Decision. After 1

year from the date of this Order, in the absence of good cause shown to the contrary, the claims for backpay as to said employees shall be dismissed.

D. Except to the extent found hereinabove in this Supplemental Decision, the allegations of the backpay specification are dismissed.